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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FAMOUS HORSE INC. d/b/a V.I.M., :

Plaintiff, :

-against- :

5TH AVENUE PHOTO INC. et al., :

Defendants. :

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07 Civ. 7818 (WHP)

ORDER

WILLIAM H. PAULEY III, District Judge:

On May 19, 2008, this Court granted Defendants 5th Avenue Photo Inc., M&B Suit Warehouse, Inc., I D-Dealz, Inc., Mike Bouskila, and Moshe Bouskila's (the "Moving Defendants") motion to dismiss. Plaintiff Famous Horse Inc. d/b/a V.I.M. ("Famous Horse") now moves to amend the Complaint.

Leave to amend shall be "freely given when justice so requires," Fed. R. Civ. P. 15(a), unless the amendment would be futile, Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001). The decision to grant or deny a motion to amend is within the Court's discretion. United States v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 889 F.2d 1248, 1254 (2d Cir. 1989). While the proposed Second Amended Complaint adds additional details to Famous Horse's Lanham Act claims, it does not cure the defects identified by the Court in its May 19, 2008 Memorandum and Order. Therefore, the amendment would be futile and Famous Horse's motion to amend is denied.


Famous Horse filed its Amended Complaint on February 13, 2008, but has not served Defendants N J French Kiss, Inc. and Florentin Fashions, Inc. (the Non-moving Defendants"). Rule 4(m) of the Federal Rules of Civil Procedure provides that a court, on its

own, may dismiss an action against a defendant that has not been served within 120 days after the complaint is filed "after notice to the plaintiff." Because Famous Horse failed to serve the Non-moving Defendants within 120 days after filing its Amended Complaint, and because its action against those Defendants would fail for the same reasons that its actions against the Moving Defendants failed, this Court dismisses the action against the Non-moving Defendants.

The Court of the Clerk shall terminate all motions pending as of July 8, 2008 and mark the case closed.

Dated: July 8, 2008
New York, New York

SO ORDERED:


WILLIAM H. PAULEY III
U.S.D.J.

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